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20 IN THE UNITED STATES DISTRICT COURT

21 FOR THE DISTRICT OF ARIZONA

22 NATHANIEL JOHNSON and KRISTEN
23 PETRILLI, ABRAHAM NIETO; GLORIA
24 and CHARLES LEWIS; FABIAN and
25 MARIE PATRON, on behalf of themselves
14 and all others similarly situated,

15 Plaintiffs,

16 vs.

17 KB HOME, a Delaware corporation;
18 COUNTRYWIDE FINANCIAL
19 CORPORATION, a Delaware corporation;
20 COUNTRYWIDE HOME LOANS, INC., a
21 New York corporation; COUNTRYWIDE
22 MORTGAGE VENTURES, LLC, a
23 Delaware company; COUNTRYWIDE-KB
24 HOME LOANS, an unincorporated
25 association of unknown form, LANDSAFE,
14 INC., a Delaware corporation; LANDSAFE
15 APPRAISAL SERVICES, INC., a California
16 corporation; and DOES 1 through 1000,

17 Defendants.

18 No. CV-09-972-PHX-FJM

19 **PLAINTIFFS' REPLY TO KB
20 HOME'S OPPOSITION TO
21 PLAINTIFFS' MOTION TO
22 COMPEL DISCOVERY
23 RESPONSES FROM KB HOME**

1 In its opposition to Plaintiffs' Motion to Compel, KB Home confirms its failure to
 2 produce documents in a timely manner and in accordance with the Rules. For the first
 3 time, KB Home estimates that it is reviewing nearly one million pages of discovery, yet
 4 only a small fraction of that has been produced. KB Home also confirms that no further
 5 productions will occur until *after* Plaintiffs' deadline for expert disclosure passes on
 6 March 5, 2010. Further, as of yesterday (March 1, 2010), KB Home started categorizing
 7 its non-email responses and producing an additional ESI "load file" that will provide
 8 information as to the source of the documents that have been produced. These ongoing
 9 productions do not, however, lessen the prejudice caused by KB Home's late and
 10 insufficient production or permit a timely evaluation by Plaintiffs.

11 KB Home claims that "the only issue presented by Plaintiffs' motion is whether or
 12 not KB Home is required to provide a designation as to which requests each document is
 13 responsive." This is only half right. Plaintiffs also have requested that KB Home
 14 provide its responsive discovery in sufficient time for Plaintiffs' experts to incorporate
 15 the evidence into their reports, with sufficient time to digest this enormous amount of
 16 material to take depositions before the discovery cutoff and with a description of the
 17 custodians searched so that Plaintiffs can assess whether an adequate search has been
 18 performed. With experts' reports due in just days, Plaintiffs cannot avoid or recover from
 19 this lack of information.

20 As to Plaintiffs' request for categorization, KB Home sets forth only a partial
 21 picture. In *Conrail v. Grand Trunk W. R.R. Co.*, 2009 U.S. Dist. Lexis 118394, at *7-8
 22 (E.D. Mich. Dec. 18, 2009), the court held:

23 The party arguing that it produced documents as they were kept in the
 24 usual course of business bears the burden of showing that the
 25 documents were so kept. *Nolan, L.L.C. v. TDC Intern. Corp.*, No. 06-
 26 cv-14907, 2007 U.S. Dist. Lexis 84406, 2007 WL 3408584, at *2 (E.D.
 27 Mich. November 15, 2007). A party does so by revealing such
 28 information as where the documents were maintained, who maintained
 them, and whether the documents came from one single source or file or
 from multiple sources or files.

Even including the information KB Home provided the day it filed its Opposition to
 Plaintiffs' Motion to Compel, KB Home has yet to indicate "whether the documents

1 came from one single source or file or from multiple sources or files.”

2 By way of example of the difficulties caused by KB Home’s non-designated
3 partial production, during review of the production to date, Plaintiffs discovered a
4 business plan document for the Countrywide/KB Home Loans joint venture, which is a
5 central aspect of the case. The clearly responsive document reports results and sets forth
6 plans for the joint venture. The document related to 2009, but Plaintiffs could find no
7 similar document for any other year in the class period. Plaintiffs informally inquired of
8 KB Home as to whether this document existed for other years and KB Home promptly
9 responded that it had located versions for the other years in the Class period, *and would*
10 *produce them in its next production on March 8.* Absent their special inquiry, Plaintiffs
11 would have had no way to know that these additional responsive documents existed and
12 were forthcoming. Furthermore, given the impending deadlines in the case, once these
13 documents were “located,” there was no reason for KB Home to withhold them until after
14 the expert cut-off. Finally, this example shows that KB Home’s sporadic production to
15 date prevents Plaintiffs from ascertaining a true picture of the evidence supporting their
16 allegations, or even ascertaining what has been produced and what may be forthcoming.

17 KB Home has frustrated Plaintiffs’ ability to comply with the Court’s Scheduling
18 Order through its delay in producing discovery and providing information reasonably
19 necessary for Plaintiffs to review and evaluate the information provided. Plaintiffs
20 request immediate production, and if that is impossible, Plaintiffs request the Court shift
21 the prejudice back onto KB Home through modification of the Scheduling Order with a
22 tight production deadline while providing Plaintiffs the period contemplated in the initial
23 Scheduling Order.

24 Plaintiffs respectfully suggest that both KB and Countrywide appear to be poised
25 to produce substantial quantities of documents. It takes time to file, analyze and study
26 these documents prior to commencing depositions and thus any revised order on
27 scheduling should account for that. The delay is not the fault of Plaintiffs who have been
28 pushing for timely responses since November 2009.

1 DATED: March 2, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2010, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant(s):

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